Commissioner, Indiana Department of Environmental Management
v.
Great Barrier Insulation Co.
2005 OEA 57 (05-A-E-3559)

TOPICS:
asbestos
adequately wet
guidance documents
penalty
substantial evidence
civil penalty policy
minor violations
potential for harm
extent of deviation

PRESIDING JUDGE:
Gibbs

PARTY REPRESENTATIVES:
Petitioner/IDEM: Jay Rodia, Esq.
Respondent: Mark Shere, Esq.

ORDER ISSUED:
November 23, 2005

INDEX CATEGORY:
Air, Enforcement

FURTHER CASE ACTIVITY:
[none]

Commissioner, Indiana Department of Environmental Management
v.
Great Barrier Insulation Co.
2005 OEA 57 (05-A-E-3559)

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
COMMISSIONER, INDIANA DEPARTMENT	)	
OF ENVIRONMENTAL MANAGEMENT	)	
	)	
Complainant	)	
	)	
v.	)	CAUSE NO. 05-A-E-3559
	)	
GREAT BARRIER INSULATION CO.	)	
	)	
Respondent	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter having come before the Court for the final hearing, held on November 9, 2005, on the Petition for Review and the Environmental Law Judge (ELJ), being duly advised and having considered the petitions, record of proceeding, and evidence presented at the hearing finds that judgment may be made upon the record, makes the following findings of fact and conclusions of law and enters the following Order:

FINDINGS OF FACT

1. On September 11, 2003, Great Barrier Insulation Company (the "Respondent") notified the Indiana Department of Environmental Management (the "IDEM") that it would be performing an asbestos removal project at a facility owned by Alcoa Power Generating, Inc., located at 4700 Darlington Road, Newburgh, Warrick County, Indiana (the Facility). The scheduled dates of removal were September 29, 2003 through October 6, 2003. The amount of material to be removed was 200 linear feet and 1600 square feet. *See* IDEM's Exhibit #7.

2. On October 3, 2003, an IDEM inspector, Mr. David Zendell, conducted an inspection of the asbestos removal project at the Facility.

3. Mr. Zendell initiated the inspection as the result of an anonymous telephone complaint. Upon his arrival at the Facility, Mr. Zendell, accompanied by an Alcoa employee, inspected the waste disposal area containing two (2) dumpsters. Both dumpsters were properly labeled and locked. No representative of the Respondent was present as the project was complete except for the disposal of the remaining waste.

4. Mr. Zendell inspected the contents of each dumpster. In each dumpster were clear bags of waste, each of which was labeled with the generator's information and sealed. In the second dumpster, he chose to take a sample from one bag after determining that the waste contained within the bag was not adequately wet as required by the applicable regulations. The label on the bag stated that Great Barrier was the generator of this waste. The determination that the material was not adequately wet was based on the following facts: (1) dust had accumulated on the inside of the bag; (2) the weight of the bag was not sufficient to indicate adequate water; (3) the bag did not feel cooler at the bottom indicating a lack of water; and (4) no moisture was observed in the bag.

5. Mr. Zendell obtained a sample using the glove bag method consistent with standard operating procedures. The sample was labeled and sent to Micro Air, Inc.[1] Analysis performed by Micro Air, Inc., in accordance with standard practices as established by the United States Environmental Protection Agency ("U.S. EPA"), revealed that the sample was regulated asbestos containing material.

6. Mr. Zendell notified the Facility that the waste was not to be removed from the Facility until such time as remedial measures could be taken. Mr. Zendell also notified the Respondent of his findings.

7. Mr. Zendell sent a written inspection report to the Respondent on October 22, 2003.

8. IDEM issued a Notice of Violation to the Respondent on February 2, 2004. A period of settlement negotiation followed. No settlement was reached. Thereafter, on June 1, 2005, IDEM issued a Notice and Order of the Commissioner of the Indiana Department of Environmental Management (the "CO"). The CO assessed a penalty of Six Thousand, Two Hundred and Fifty Dollars ($6,250) against the Respondent.

9. The Respondent timely filed its Petition for Review. This matter proceeded to hearing on November 9, 2005.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3.

2. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.,* 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.;* I.C. 4-21.5-3-27(d). "*De novo* review" means that:

[1] IDEM contracts with Micro Air, Inc. to perform analysis on such samples.

> all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind.Ct.App. 1981).

3. The IDEM alleges that the Respondent violated 326 IAC 14-10-4(6)(A). The pertinent portions of this regulation state:

> Each owner or operator of a demolition or renovation activity to whom this section applies according to section 1 of this rule, shall comply with the following emission control procedures:
> (6) For all RACM, including material that has been removed or stripped, the following requirements must be met:
> (A) Adequately wet the material and ensure that it remains wet until collected and contained or treated for disposal and is disposed of in accordance with 40 CFR 61.150* and 329 IAC 10-8 *[329 IAC 10-8 was repealed filed Jan 9, 1998, 9:00 a.m.: 21 IR 1733.]* (RACM shall be adequately wet throughout all stages of disposal).

4. The IDEM presented substantial evidence that the Respondent violated this provision on October 3, 2003.

5. The IDEM used the Civil Penalty Policy[2] to determine the appropriate penalty in this matter. According to this policy, a civil penalty is calculated by "(1) determining a base civil penalty dependent on the severity and duration of the violation, (2) adjusting the penalty for special factors and circumstances, and (3) considering the economic benefit of noncompliance." The base civil penalty is calculated taking into account two factors: (1) the potential for harm and (2) the extent of deviation.

6. The policy states that the potential for harm may be determined by considering "the likelihood and degree of exposure of persons or the environment to pollution" or "the degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the program". There are several factors that may be considered in determining the likelihood of exposure. These are the toxicity and amount of the pollutant, the sensitivity of the human population or environment exposed to the pollutant, the amount of time exposure occurs and the size of the violator.

[2] IDEM's Civil Penalty Policy is a nonrule policy document, ID No. Enforcement 99-0002-NPD, originally adopted on April 5, 1999 in accordance with IC 13-14-1-11.5.

7. In this case, the ELJ concludes that the potential for harm is minor. While asbestos is classified as a carcinogen and a hazardous air pollutant, the amount of asbestos containing material (ACM) found to be inadequately wet was very small. Also, the ACM was in a sealed bag in a sealed and locked dumpster in an industrial facility where relatively few people would be in contact with it. There would be very little adverse effect on the program.

8. The second factor is the extent of deviation from the regulation. In this case, the Respondent presented evidence that the material in question was "mag block" and that this material is a hard substance, relatively impervious to absorbing moisture. The Respondent's witness, the project manager for this particular project, testified that sufficient water was used on this project. In addition, the IDEM's case manager, Ms. Lynne Sullivan, concluded that the extent of deviation was minor due to the amount of material in violation compared to the amount of material removed during this project. Therefore, the ELJ concludes that the extent of deviation was minor.

9. The ELJ finds that there were no aggravating or mitigating factors to consider or that the Respondent received any economic benefit. While there was testimony that it is the IDEM Office of Enforcement's policy to select a penalty from the middle of the range, the policy does not mention this. Therefore, in accordance with the penalty policy, the appropriate penalty is the lowest amount in the penalty matrix for a minor/minor violation. The Respondent is assessed a penalty of One Thousand Dollars ($1,000).

10. The Respondent's attorney has raised a number of issues in this matter that should be addressed. First, he argues that the amount of time between the violation and the issuance of the CO should be considered. However, he does not present any evidence that this lapse of time has prejudiced the Respondent in any way. The mere passage of time is insufficient, without a showing of prejudice, to convince the ELJ that the Respondent should not be found in violation or that the penalty should be lowered.

11. The Respondent also argues that IC 13-30-7, Minor Violations Statute, should apply. However, even though this ELJ determined that the appropriate penalty fell within the minor/minor penalty matrix under IDEM's penalty policy, the ELJ concludes that the violation does not qualify as a minor violation under this statute. The law states that if the IDEM determines that a violation "does not present an immediate or reasonably foreseeable danger to the public health or the environment",[3] then the penalty shall not exceed five hundred dollars ($500). Due to (1) the carcinogenic nature of asbestos; (2) that it has been classified as a hazardous air pollutant; and (3) that wetting ACM is a known method of preventing airborne particulates, the ELJ concludes that failure to adequately wet ACM presents a reasonably foreseeable danger to public health meriting the use the general Civil Penalty Policy.

[3] There are other requirements for this determination, but this is the relevant portion of the statute.

12. The Respondent also argues that the inspector's failure to follow the U.S. EPA's guidance on adequately wetting ACM precludes a finding that the Respondent was in violation. However, this is a guidance document and does not have the effect of law. The IDEM inspector presented substantial evidence that the ACM in question was not adequately wet. The Respondent's evidence that the inspector did not follow each and every recommended procedure mentioned in the guidance was not sufficient to overcome this.

FINAL ORDER

AND THE COURT, being duly advised, hereby **ORDERS, JUDGES AND DECREES** that:

1. The Respondent, Great Barrier Insulation Company violated 326 IAC 14-1-4(6)(A) on October 3, 2003.

2. The Respondent is assessed a penalty of One Thousand Dollars ($1,000.00).

You are hereby further notified that pursuant to provisions of IND. CODE § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED THIS 23rd day of November, 2005.

Hon. Catherine Gibbs
Environmental Law Judge